



### **Submission of Canadian Publisher's Council on Mandatory Review of Copyright Act, May 2018**

The Canadian Publishers' Council (CPC) welcomes the opportunity to contribute to the current review of the *Copyright Act*<sup>1</sup> (the "Act") by the Standing Committee on Industry, Science and Technology.

CPC was founded in 1910. It represents the interests of over 20 publishing companies that publish books and other media for elementary and secondary schools, colleges and universities, professional and reference markets, and the retail and library sectors. Collectively, CPC's member companies have close to 20,000 Canadian titles in print. Moreover, they employ more than 3,000 Canadians and together account for nearly three-quarters of all domestic sales of English-language books. Taken together, ninety-five percent of textbook and education related content purchased by Canadians is published by CPC's members.

In the last round of substantive copyright review and reform, the federal government introduced significant changes to the 'fair dealing' provisions of the Act (the "Last Copyright Reform").<sup>2</sup> That introduction was heralded in 2012 as being part of a "balanced approach" to copyright reform designed to respect "the everyday activities of Canadians while giving creators and copyright owners the tools they need to protect their work and to grow their business using new and innovative business models."<sup>3</sup> However, for Canadian publishers, the so-called "balanced approach" did not provide any such tools. Instead, since the Last Copyright Reform, a significant number of Canadian publishers have seen an erosion of their businesses largely because the K-12 and post-secondary education sectors have routinized their free reproduction of copyright-protected works in Canada on a massive, institutional scale all in the name of 'fair dealing for the purpose of education' (the "Education Exception"). This has resulted in a serious disruption and contraction in the Canadian publishing industry in terms of reduced income, jobs and the creation of quality Canadian content, none of which is in the public or private

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<sup>1</sup> R.S.C., 1985, c. C-42.

<sup>2</sup> *Copyright Modernization Act*, S.C. 2012, c. 20.

<sup>3</sup> Media Relations, Industry Canada, June 19, 2012, "Ministers Paradis and Moore Welcome Passage by the House of Commons of the Copyright Modernization Act" [News Release] Available at: <https://www.canada.ca/en/news/archive/2012/06/ministers-paradis-moore-welcome-passage-house-commons-copyright-modernization-act.html>

interest of any Canadian. Surely, none of these negative consequences were intended by the *Copyright Modernization Act* passed in 2012.

In this submission, CPC will describe the market disruption that the introduction of the Education Exception has created and will also propose a two-pronged solution going forward which is focussed on promoting copyright policy that encourages the creation and dissemination of Canadian literary works in exchange for a fair reward for creators and publishers. CPC's proposed solution contains "course corrections" and "forward-looking considerations", the kind which, we believe The Honourable Navdeep Bains and The Honourable Mélanie Joly encouraged this Honourable Committee to study as part of its parliamentary review of the Act.<sup>4</sup>

### Marketplace Disruption

CPC's members are publisher-affiliates of the copyright collective, Access Copyright. They rely on and reinvest the income they earn from collective licenses Access Copyright negotiates on their and authors' behalf as well as the tariffs Access Copyright pursues at the Copyright Board of Canada. That copyright income helps finance the volume of high quality Canadian works which may be created for the public, especially in a transitional environment where Canadian publishers are endeavouring to invest in the development of digital content. However, since the Last Copyright Reform it is estimated that total collective licensing revenue from Access Copyright has declined by \$30 million annually.<sup>5</sup>

This sharp decline is largely a result of provincial education ministries outside of Quebec, and most post-secondary institutions across Canada (the "Education Sector") rejecting Access Copyright's collective licenses. They did this shortly after the Education Exception was introduced in the Last Copyright Reform. Contemporaneously with their new refusal to pay authors and publishers, the Council of Ministers of Education, Canada (CMEC), Universities Canada, and Colleges and Institutes Canada created their own copying guidelines ("Guidelines"), under which they proclaimed their ability to reproduce substantial portions of copyright-protected works (e.g. entire chapters of books) on a systematic and extensive scale for free.

Comparing the Guidelines to the Access Copyright's collective licenses it is clear that the former were designed to replicate the uses permitted under the latter. In effect, the Education Sector

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<sup>4</sup> Letter from the Minister of Innovation, Science and Economic Development and the Minister of Canadian Heritage submitted to the Committee regarding the Copyright Act, December 14, 2017.

<sup>5</sup> *Economic Impacts of the Canadian Educational Sector's Fair Dealing Copying Policy*, PricewaterhouseCoopers LLP, June 2015 at p. 7. Available at <[https://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf)>

ostensibly wrote itself its own royalty-free license to use copyright-protected works for free. And use and share copyright-protected works the Education Sector does -- to the tune of hundreds of millions of pages each year.<sup>6</sup>

While the implementation of the Education Exception was rationalized by CMEC and others in the Last Copyright Reform as one which would promote access and use of copyrighted works without harm to rightsholders,<sup>7</sup> the opposite has proven to be true. A comprehensive study of the economic impact of the Guidelines completed by PricewaterhouseCoopers LLP (PwC) in 2015 contains a number of findings on the actual and forecasted negative market effect of the Guidelines.<sup>8</sup> For Canadian publishers and authors these include:

- substantial loss of revenue, as a result of copying royalties and the substitutive effect of copying on primary sales
- a reduction in publisher's investment and attendant reduction in quality and diversity of Canadian content published for the educational market with some publishers exiting the market completely
- Impeded ability to transition from publication of print content to the creation and publication of digital resources
- a significant reduction in high-skill, high-value publishing sector jobs

PwC's foregoing findings are validated by the latest audited financial statements contained in Access Copyright's 2017 Annual Report:<sup>9</sup>

Since 2012, the amount of revenue collected by Access Copyright from the K-12 and post-secondary sectors has declined dramatically by 89.1%. For the K-12 sector, where the Ministries of Education (outside of Quebec) and the Ontario school boards have refused to pay fees certified by the Copyright Board since 2013, this decrease is even more pronounced with a decline of 99.1% in revenues collected from 2012 to 2017.<sup>10</sup>

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<sup>6</sup> Sources are as quoted in the testimony of R. Levy, Access Copyright, May 22, 2018

<sup>7</sup> Legislative Committee on Bill C-32, Evidence, 40<sup>th</sup> Parliament, 3<sup>rd</sup> Session, Thursday, March 24, 2011 (Hon. Ramona Jennex, Chair and Minister of Education for Nova Scotia, Council of Ministers of Education, Canada) Available at <<http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-20/evidence>>

<sup>8</sup> *Supra* note 5 at pp. 7 - 12.

<sup>9</sup> Access Copyright (2018). 2017 Annual Report of Access Copyright. Available at [http://www.accesscopyright.ca/media/115217/access\\_2017ar.pdf](http://www.accesscopyright.ca/media/115217/access_2017ar.pdf)

<sup>10</sup> *Ibid* at p. 12.

In addition to the loss of Access Copyright royalties, the free copying encouraged by the Guidelines is contributing to a decline in sales. Statistics Canada data reveal that sales of books to educational institutions declined by 41% between 2010-2016 – a loss of \$132 million in six years.<sup>11</sup>

The negative practical reality of the foregoing market disruption caused by the Education Exception is reflected in the fact that Oxford University Press; Edmond Montgomery; and McGraw Hill Education have stopped publishing content for the Canadian K-12 sector. Market Conditions caused by the Education Exception forced these firms to move their capital to other markets, which ultimately means a loss of jobs and a reduction in new educational resources for Canadian K-12 students.

While the Education Sector's interpretation of the Education Exception has proven to be economically hurtful for publishers and authors, it has also been found by the Federal Court of Canada to be illegal. In its 2017 ruling against York University in an action Access Copyright was forced to commence when York refused to pay an interim tariff issued by the Copyright Board of Canada applicable to York's copying of course content (the "2017 York Case"), the Court was succinct and categorical in its assessment of York University's application of the Guidelines: "It is evident that York created the Guidelines and operated under them to obtain for free that which they had previously paid for."<sup>12</sup> The Federal Court also dismissed York University's argument that the tariffs Access Copyright prosecutes under section 70.12 of the Act ("General Regime Tariffs") are voluntary vis-à-vis users of works covered by the tariff and that York could therefore choose to "opt-out" of paying such General Regime Tariffs.

York University would never have adopted and applied the Guidelines but for the introduction of the Education Exception in 2012. However, that fact has not stopped it from appealing the Federal Court ruling which, until such time York has exhausted all its appeals, will only mean more uncertainty and more legal costs for all parties concerned.

### Two-Pronged Solution

CPC recommends a two-pronged approach to fixing the problems created by the Education Exception. The first prong concerns statutory amendments or applying "course corrections" to the Act.

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<sup>11</sup> See accompanying document entitled "Revised CPC Submission on Statistics Canada data.

<sup>12</sup> *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 at para 272.

The second prong concerns the prospect of CPC and its partners in the publishing sector creating a national digitized content resource for Canadian students and educators.

### 1. *Statutory Amendments*

CPC requests that the federal government apply a course correction to the Education Exception premised on the commercial availability of copyright-protected works that a user wishes to copy. A definition of “commercial availability” already exists in the Act. It provides, in part, that a work is commercially available when a license to reproduce it “is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort.” The application of this commercial availability condition to the Education Exception will put an end to the unfair free use of copyright-protected works that the Education Sector has taken advantage of at the great expense of publishers and authors since 2012. In short, it will promote certainty and fairness in the publishing market for educational content and will restore the long-standing copyright policy objectives of encouraging the creation and dissemination of Canadian literary works in exchange for a fair reward for creators and publishers.

The application of the commercially available condition will do nothing to interfere with access to copyright protected works by educators and other users. In events where a collective license is not available within a reasonable time and for a reasonable price or such license is unlocatable with reasonable effort, users will be free to use the applicable excerpts of the work without permission or payment.

The CPC also requests that the tariff setting regimes prescribed by the Act be harmonized as part of the Copyright Board reform process currently underway. Specifically, the CPC asks that those collectives who prosecute General Regime Tariffs, like Access Copyright, be granted the same ability to seek the same statutory damages that those collectives administering performing rights and communication rights in musical works can under the ‘mandatory’ regime. Moreover, CPC wishes for the government to amend the Act to remove any uncertainty about whether such General Regime Tariffs are voluntary, as York University unsuccessfully argued in the 2017 York Case.

As it stands, under the general regime, Access Copyright may only seek to recover for its members statutory damages equal to the amount of royalties that would have been payable to it pursuant to license agreement or certified tariff. By contrast, mandatory regime collectives have a statutory right to seek, on behalf of their members, statutory damages in a sum of not less than three

and not more than ten times the amount of the applicable royalties. Where the statutory damages available in the mandatory regime are appropriate and effective, statutory damages available under the general regime are not. Indeed, weak statutory damages available under the general regime, coupled with the high cost to rights-holders of pursuing legal action against those end-users who unjustifiably choose not to pay a certified tariff, undercut the policy goals of the Act and undermine the effectiveness of the entire Copyright Board tariff regime.

## 2. *National Digitized Content Resource*

Educators value ready access to high-quality digital content. The desire for such access was an important part of their advocacy for the Education Exception in 2012. Toward the end of improving access to high-quality content, CPC is interested in creating a ‘one-stop’ national digitized content resource which, in collaboration with educators, would be developed to contain curated, copyright-cleared, curriculum-appropriate content in both official languages (the “Digital Commons”). The Digital Commons, CPC envisions would be searchable, and its content shareable between teacher and student in the K-12 and post-secondary sectors.

CPC wants Digital Commons-content to include a wide variety of updated literary and artistic works, including books; periodicals; photographs; illustrations; lyrics and musical scores and videos, all of which would reflect Canadian values and perspectives. Concerning the licensing arrangement and fees for use of the Digital Commons, we anticipate that we will take some cues from the Simplified Access for Multidisciplinary Education and Learning (SAMUEL) platform currently offered by COPIBEC.

If the government takes statutory measures to put an end to the harm created by the Education Exception, CPC believes its members will be in a better position to make the Digital Commons a reality.

Thank you for your consideration of CPC’s perspective on the current state of the Act and its impact on our members and Canada’s public interest in its publishing industry.

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